REME COURT, U. S.
JAN 9 1974
MICHAEL RODAK, JR., CLERK

No. 73-720

# In the Supreme Court of the United States

OCTOBER TERM, 1973

EDWARD WARNER AND ELIZABETH WARNER,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE REPONDENT IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-720

---

EDWARD WARNER AND ELIZABETH WARNER,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

**MEMORANDUM FOR THE REPONDENT IN OPPOSITION**

---

Section 1033 of the Internal Revenue Code permits the non-recognition of gain from the involuntary conversion of property as a result of condemnation or "threat or imminence" of condemnation. Both courts below concluded that petitioner[1] was not compelled to convert his property involuntarily when he sold it (Pet. App. A4, A24-A25). Petitioner seeks further review of that factual determination.

For purposes of qualification under Section 1033, the conversion, whether pursuant to a condemnation proceeding or under a threat of taking, must be involuntary

---

[1] References to petitioner are to Edward Warner. His wife is a party because she filed a joint return with her husband for 1965.

and motivated by a force beyond the property owner's control. *Dear Publication and Radio, Inc.* v. *Commissioner,* 31 T.C. 1168, 1174, affirmed, 274 F. 2d 656, 660 (C.A. 3). See *Steuart Brothers* v. *Commissioner,* 261 F. 2d 580, 582 (C.A. 4). Whether a sale of property is made under threat or imminence of condemnation is a question of fact to be decided by taking into account all the facts and circumstances known to the seller at that time. *Maixner* v. *Commissioner,* 33 T. C. 191, 195; *Carson Estate Co.* v. *Commissioner,* 22 T.C.M. 425; *Stone* v. *Commissioner,* 32 T.C.M. 94. While the statute does not require that the possibility of condemnation be reduced to a certainty, and recognizes the possiblity that the impending, undesirable consequence may never occur, the crucial factor is whether petitioner was compelled to take action to avoid the undesirable consequence. *S&B Realty Co.* v. *Commissioner,* 54 T.C. 863, 870.

Here, the record demonstrates that petitioner could not reasonably have believed that his land was under threat or imminence of condemnation when it was sold in 1965. To the contrary, he voluntarily sold it to Gerald Derks, an undisclosed agent of Consumers Power Company (Pet. App. A12-A14). Although T. R. Tucker, the senior parkland acquisition supervisor for the Michigan Department of Natural Resources, had previously approached petitioner with regard to acquiring his properties for a proposed park, he told petitioner that the state was extremely reluctant to exercise the power of condemnation, that it had infrequently done so in the past, and that it had funding problems with the park project that definitely precluded the possibility of condemnation (Pet. App. A2-A3, A9-A10). Petitioner also conceded that in his discussions with Tucker, the latter did not

say that he was going to condemn petitioner's land. Petitioner testified, however, that he knew that Tucker could have done so (Pet. App. A3-A4).

Relying upon Tucker's testimony concerning his conversation with petitioner, the Tax Court found (Pet. App. A24) that no reasonable man would have concluded on these facts that the State was going to condemn the property. The court of appeals affirmed the Tax Court's ultimate holding that petitioner's dealings with Tucker gave rise to no reasonable inference by petitioner that his land was under threat or imminence of condemnation (Pet. App. A3-A4). It held, however, that petitioner's admission that Tucker said he was not going to condemn petitioner's property was "more than sufficient" to support the Tax Court's ultimate finding (Pet. App. A3-A4).[2] The affirmance of the Tax Court upon this alternative basis does not, as petitioner argues (Pet. 15-16), represent an erosion of the Tax Court's decision. It simply reenforces the Tax Court's ultimate finding with additional record evidence.

Similarly, petitioner's ultimate sale of his property to Gerald Derks, an undisclosed agent of Consumers Power Company, was not motivated by the threat or imminence of condemnation. In late 1964, that company selected a site for a new generator plant which includ-

---

[2] Contrary to petitioner's argument (Pet. 22), the reliance by the court of appeals upon his testimonial admission is fully in accord with the case law which requires a reasonable belief that the taxpayer's property was subject to a "threat or imminence" of condemnation. See, *e.g.*, *Maixner* v. *Commissioner, supra; S&B Realty Co.* v. *Commissioner, supra.* The fact that petitioner knew that Tucker could have condemned the property does not objectively support the existence of the "threat or imminence" of condemnation in the face of Tucker's undisputed statement that he would not condemn the property.

ed petitioner's property and hired Gerald Derks to acquire this land, on the condition that Derks purchase the land in his name and not reveal that he represented a principal with condemnation powers. In early December, 1964, Derks met with petitioner, and thereafter petitioner contracted to sell the property to Derks (Pet. App. A12-A14). At that time, petitioner was unaware that Derks' principal was the power company or that it had the power to condemn. Both courts below accepted as credible Derks' testimony that he made no threats to petitioner and that the sale was not coerced or otherwise made under adverse circumstances (Pet. App. A4, A14). Accordingly, there is no basis for petitioner's claim that his property was sold under a threat or imminence of condemnation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JANUARY 1974.

DOJ-1974-01